In the Supreme Court of the State of Michigan

SHANNON BITTERMAN,

Plaintiff-Petitioner,

v.

CHERYL D. BOLF,

Defendant-Respondent.

Supreme Court No. 151520

Court of Appeals No. 319663
HON. PETER D. O'CONNELL, P.J.
HON. KAREN M. FORT HOOD
HON. MICHAEL F. GADOLA

Saginaw Circuit No. 13-019397-CZ
HON. ROBERT L. KACZMAREK

OUTSIDE LEGAL COUNSEL, P.L.C.
Philip P. Ellison (P74117)
P.O. Box 107
Hemlock, Michigan 48626
(989) 642-0055
pellison@olcplc.com
Counsel for Petitioner Shannon Bitterman

PLUNKETT COONEY, P.C.
Mary Massaron (P43885)
38505 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 901-4000
mmassaron@plunkettcooney.com
Counsel for Respondent Cheryl D. Bolf

BRIEF OF *AMICUS CURIAE* MICHIGAN PRESS ASSOCIATION

BUTZEL LONG, P.C.

Robin Luce Herrmann (P46880)
Joseph E. Richotte (P70902)
Jennifer A. Dukarski (P74257)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 593-3044
luce-herrmann@butzel.com
richotte@butzel.com
dukarski@butzel.com
Counsel for Amicus Curiae Michigan Press Association

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Rules

Other Authorities

INTEREST OF AMICI CURIAE

> "Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it."
>
> --*Thomas Jefferson to John Jay, 1786.*

Founded in 1868, the Michigan Press Association is the official trade association for more than 320 print and digital newspapers in Michigan and dedicated to promoting the freedom of the press throughout the State. The MPA's members report on issues of great importance to Michiganders, including the operations of their local governments. The Open Meetings Act is an essential tool for the MPA's members to fulfill their duty to the public. On behalf of its members, the MPA offers this brief in support of robustly defining the term "public official" in aid of the OMA's purpose: fostering transparent government to safeguard our free society.

JURISDICTION

The Court has jurisdiction to review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). Petitioner sought leave to appeal 16 days after the decision of the Court of Appeals, which is well within the 42-day deadline for filing applications with this Court. MCR 7.302(C)(2).

QUESTION PRESENTED

QUESTION NO. 1:	How should this Court define the term "public official" under Section 13(1) of the Open Meetings Act, MCL 15.273(1)?

HOW ANSWERED

PETITIONER:	A person elected or appointed to carry out some portion of a government's sovereign powers.
MICHIGAN PRESS ASSOCIATION:	Any person who exercises a power conferred by, who discharges a duty imposed under, or whose activity is specified by the OMA.
TRIAL COURT:	A member of the public body, and no other.
COURT OF APPEALS:	A member of the public body, and no other.
RESPONDENT:	A member of the public body, and no other.

By leave of the Court, the Michigan Press Association respectfully submits this brief as *amicus curiae* in support of Petitioner Bitterman's petition for leave to appeal on the question how to define the term "public official" in the Michigan Open Meetings Act.

INTRODUCTION

We are a sovereign people. Const 1963, art 1, § 1. Although we entrust the day-to-day operations of our government to elected and appointed public officials, we exercise self-government as an informed electorate by supervising them and holding them accountable for their work. It is therefore essential to the health and survival of our republic that we remain able to inform ourselves about the workings of our government by accessing its records, by attending its meetings, and by questioning its activities. It is therefore our prerogative to demand that our public officials conduct our business in the open and to adhere to the laws enacted in our name. It is equally our prerogative to punish those officials who violate our trust by violating those laws.

The OMA is an exercise of those prerogatives. Among other things, the OMA requires public bodies to hold all of their meetings in public, to make all of their decisions during such meetings, and to faithfully record their decisions in minutes that are publicly reviewed and approved. MCL 15.263(1)-(2); MCL 15.269(1). The OMA also contains enforcement provisions designed to encourage compliance by punishing public officials who intentionally violate it commands. MCL 15.273(1). The decision below questions whether we have actually exercised our prerogatives to the fullest measure. Thus, this case is about protecting two equally important interests: (1) our right of access to information of and concerning the business of our government; and (2) our right to hold our public officials accountable in our courts for violations of our laws.

Building upon its earlier decision in *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998), the Court of Appeals misconstrued the term "public official" in a manner that frustrates the purpose of the OMA by effectively nullifying its enforcement provisions. Instead of broadly applying the Act to all public officials (which would unquestionably further both of the sovereign interests served by the OMA), the Court of Appeals instead elected to create two classes of public officials (members of public bodies and their delegates) and shield one of those classes (the delegates) from the OMA's civil and criminal enforcement provisions.

The Court should reverse the decision in this case and in *Whitney*. In the ordinary sense of the term, a public official is a person who engages in a governmental function. Defining a public official in this way ensures that any person who is charged with taking action governed by the OMA is subject to the Act's penalties for intentional violations of its provisions, regardless of whether that person is a member of a public body or one of its delegates. In turn, this promotes the Act's purpose: fostering transparent government as a means of safeguarding our free society.

STANDARD OF REVIEW

This matter requires the Court to construe a statute. Statutory construction is reviewed *de novo*. *Veenstra v Washtenaw County Club*, 466 Mich 155, 159; 465 NW2d 643 (2002).

ARGUMENT

1. The OMA implements and enforces the public's fundamental right of access to information of and concerning government business.

The primary purpose of the First Amendment is to protect and promote the free discussion of governmental affairs. *Miller v Alabama*, 384 US 214, 218; 86 S Ct 1434; 16 L Ed 2d 484 (1966). As Judge Damon Keith warned:

> *Democracies die behind closed doors*. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately…. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." They protected the people against secret government.

Detroit Free Press v Ashcroft, 303 F3d 681, 683 (CA 6 2002) (quoting *Kleindienst v Mandel*, 408 US 753, 773; 92 S Ct 2576; 33 L Ed 2d 683 (1972) (quoting *Thomas v Collins*, 323 US 516, 545; 65 S Ct 315; 89 L Ed 2d 430 (1945) (Jackson, J., concurring))).[1]

Thus, inherent among the rights protected by the First Amendment is the right of access to information so that an informed public can govern itself: "[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc v Virginia*, 448 US 555, 587; 100 S Ct 2814; 65 L Ed 2d 973 (1980) (Brennan, J., and Marshall, J., concurring). *See also Press Enterprise v Superior Court of California*, 464 US 501; 104 S Ct 819; 78 L Ed 2d 629 (1984) ("*Press Enterprise I*"); *Press Enterprise v Superior Court of California*, 478 US 1; 106 S Ct 2735; 92 L Ed 2d 1 (1986) ("*Press Enterprise II*").

Stated simply, access to information of and concerning the functioning of government is a fundamental right. *Press Enterprise I*, 464 US at 517 ("the First Amendment's . . . 'common core purpose of assuring freedom of communication on matters relating to the functioning of government,' . . . provides protection to all members of the public 'from abridgment of their rights of access to information about the operation of their

[1] Emphases are supplied by the Michigan Press Association, and citations and footnotes omitted, unless otherwise noted.

government . . . .'") (Stevens, J., concurring). *See also Detroit Free Press*, 303 F3d at 696 (same quoting *Richmond Newspapers*, 448 US at 584 (Stevens, J., concurring)).[2]

The Michigan Constitution also protects the right of access in its parallel free speech and assembly provisions.[3] Const 1963, art I, §§ 3, 5, and 23.

---

[2] While the caselaw on the right of access has chiefly developed in the context of judicial proceedings, those authorities make clear that the right extends beyond the judicial context because of the role it plays in self-governance generally. *See, e.g., Richmond Newspapers*, 448 US at 587 ("But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.") (Brennan, J and Marshall, J, concurring); *Globe Newspaper Co v Superior Court*, 457 US 596, 604-5; 102 S Ct 2613; 73 L Ed 2d 248 (1982) ("to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."); *Press Enterprise I*, 464 US at 517 ("The focus commanded by the First Amendment makes it appropriate to emphasize that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader . . . [and] . . . provides protection to all members of the public 'from abridgment of their rights of access to information *about the operation of their government*, including the Judicial Branch.'") (Stevens, J, concurring); *Detroit Free Press*, 303 F3d at 696 ("[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of *their government* . . . .") (emphasis in original).

[3] The MPA acknowledges that the Court of Appeals has ruled that the public's right of access is rooted in the common law, not in our Constitution. *In re Midland Publ'g Co*, 113 Mich App 55, 63-64; 317 NW2d 284 (1982). The *Midland Publishing* court engaged, however, in no analysis of our Constitution, and its decision predates almost all of the federal authority cited in this brief. As this Court later declared in *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998), parallel constitutional provisions should be construed identically "absent definitive differences in the text . . ., common-law history . . ., or other matters of particular State or local interest . . . ." If the Court grants leave to appeal, it should overrule *Midland Publishing* and declare that our right of access is not merely a right at common law (subject to abridgment by the Legislature), but a fundamental right protected under our Constitution's parallel free speech and assembly provisions. Alternatively, it should recognize a right of access under Article 1, Section 23. A contrary ruling would turn the sovereignty analysis on its head. Government exists only because the people have created it and delegated to it a portion of their sovereign power. *In re Spangler*, 11 Mich 298, 308 (1863). As a matter of first principles, the government created by the people cannot deprive those same people of their inherent power to access its records and observe its proceedings—that they may thereafter improve upon, alter, or abolish the government they created—absent a compelling interest. *See* Note 2, *supra*, generally; THE DECLARATION OF INDEPENDENCE, para. 2 (US 1776).

The OMA implements and further protects the access rights preserved by the federal and State constitutions. It promotes "governmental accountability by facilitating public access to official decision making [and] provid[ing] a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). For example, the OMA safeguards the public's right to record, broadcast, and televise public meetings. MCL 15.263(1). It guarantees the public's right to attend public meetings without preconditions and to address the public officials during the meeting. MCL 15.263(4)-(5). It imposes upon public bodies the duty to give the public fair notice of the meetings so they can attend. MCL 15.264-MCL 15.266. Perhaps most importantly, for present purposes, the OMA requires public bodies to create and maintain accurate, approved minutes of their meetings. MCL 15.267; MCL 15.269. Those minutes must be made available to the public. MCL 15.269(2)-(3).

The OMA also provides mechanisms by which the public may enforce its right to have notice of and participate in the act of self-governance. It not only authorizes elected officials to enforce the Act, but it also preserves a private right of action to prevent the unlawful exercise of legislative power. MCL 15.271. With limited exceptions, the OMA invalidates decisions proved to have been discussed or made behind closed doors. MCL 15.270. And it makes intentional violations by public officials punishable by imprisonment and a civil penalty. MCL 15.272; MCL 15.273.

These enforcement mechanisms are intentional. The original version of the OMA only required that the final votes of public bodies be made in public; it did not contain any enforcement language. Consequently, "nothing prevented the wholesale evasion of the [A]ct's provisions." *Booth Newspapers v University of Mich Bd of Regents*, 444 Mich 211,

221; 507 NW2d 422 (1993). The enforcement mechanisms were added, along with other changes, to "promote a new era in governmental accountability." *Id*. at 222-23.

2. The OMA regulates people, not things; it regulates the *activities* of public officials exercising the powers of a public body.

Government, like corporations, has no physical existence. It is a structure through which power delegated by the people is exercised. Public officials are the individuals who exercise that delegated power within the limits imposed by the structure created by the people.

Whitney and its progeny mistakenly conflate structure for power. They read the OMA to regulate public bodies (the structure of government) rather than regulating the public officials who exercise authority (those who exercise the delegated powers). We entrust the power and function of government to public officials, and it is those officials whom we regulate. The OMA does not require a faceless entity to hold public meetings; it requires public officials to deliberate toward, and make, policy decisions in public view.

In the same vein, the OMA also assigns tasks that must be performed by individuals. For example, it requires a public body to "designate" a person to provide the public notice. MCL 15.265(1). It also directs the public body to name a clerk or the designated secretary of the public body to take and maintain minutes of closed deliberations. MCL 15.267. Of course, the public body—the structure—can do nothing. These are statutory commands directing the public officials, who exercise the power delegated to the public body, to designate specific individuals to perform these takes.

Notably, the OMA does not require that the members of the public body designate one of their own to undertake these activities. Indeed, there are even statutory examples where a person who is not a member of the public body is legally charged with the task of

taking minutes for that body. County clerks are appointed to record the proceedings of county boards of supervisors. MCL 46.4. ("The county clerk of each county . . . shall . . . record all of the proceedings . . . .") They are not, however, members of those boards. *See* MCL 46.409; MCL 46.404. Likewise, city clerks are appointed to record the proceedings of city councils, but are not members of the public body. MCL 88.4 ("The city clerk shall be the clerk of the council, but shall have no vote therein. He shall keep a full record of all proceedings of the council . . . .") Another example is at work in this case. Village clerks are not members of village councils, but they are the individuals designated to keep minutes of council meetings. MCL 62.1(1) ("in each village, the following officers shall be elected: a president, 6 trustees, 1 clerk, and 1 treasurer. The president and trustees constitute the council."); MCL 64.5(1) ("The clerk is the clerk of the council and shall attend its meetings"); MCL 64.5(3) ("The clerk shall record all the proceedings and resolutions of the council . . . .").

Since the OMA regulates individuals, the question becomes whether those who are entrusted with the discharge of certain duties under the OMA qualify as "public officials" within the meaning of the Act, whether acting pursuant to law or by designation of other public officials. If one views the OMA as an exercise of sovereign prerogative to establish the rules governing how public officials exercise power, as well as the punishment for breaking those rules, then a "public official" is any person who exercises a power conferred by, who discharges a duty imposed under, or whose activity is specified by the OMA because those individuals are the people to whom the rules and punishment are directed.

If the Court declines to take such an expansive view, it should still reject the *Whitney* test in favor of the five-factor test it created to determine whether a position qualifies as "public official" (which the *Whitney* court never cited, much less distinguished):

(1) The position must be created by law;

(2) It must possess a delegation of governmental power to be exercised for the public benefit;

(3) The powers conferred, or the duties to be discharged, must be legislatively defined;

(4) The duties must be performed independently, unless they are those of a subordinate office created or authorized by the legislature and placed under the control of the superior officer or body; and

(5) It must have some permanency and continuity, and not be temporary or occasional.

Council of Orgs & Others for Educ About Parochiaid v Governor, 455 Mich 557, 585, n.22; 566 NW2d 208 (1997).

There can be no question that county, village, and city clerks fit within the *Parochiaid* test. Their positions are created by law. They possess legislatively defined powers and duties. Their duties—which include accurate recordkeeping for the legislative bodies at their respectively levels of government—are discharged for the public benefit. Their duties are performed subordinate to the review and approval of the public officials constituting the public body (*e.g.*, in the case of taking minutes), or they are performed independently (*e.g.*, in the case of drafting and posting notices of meetings). And their offices and duties are permanent and continuing by law. *See* MCL 168.203 (county clerk holds office until a successor is elected); MCL 85.6 (city clerk hold office for one year and until their successor is elected); MCL 62.4 (village clerk holds office for two years or until a successor is elected).

Likewise, a person delegated by the public body to fulfill duties legislatively imposed under OMA also qualifies as a public official under this definition. The OMA establishes the duties to be performed, authorizes the public body to delegate those duties,

the people discharging the duty is subordinate to the public body's review and approval (again, *e.g.*, in the case of taking minutes) or they are performed independently (again, *e.g.*, in the case of drafting and posting notices of meetings), and the positions are permanent—they are required for each meeting. Accordingly, they should be deemed public officials under the *Parochiaid* test, as well.

3. The lower courts' more restrictive interpretation of the term "public official" effectively nullifies the OMA's enforcement provisions.

On their face, the OMA's criminal and civil penalties for intentional violations of the Act apply to *any* violation of its terms by "a public official." In limiting the term "public official" to a member of the public body (without engaging in any statutory analysis), the *Whitney* definition created two classes of public officials: (1) members of the public body; and (2) and everyone else to whom a legal duty is delegated under the Act. In doing so, the Court of Appeals at best elevated form over substance, and at worst judicially amended the penalty provisions to apply to some, but not all, violations of the OMA.

This Court has not hesitated to reject appeals to form over substance to preserve the integrity of the OMA. For example, in *Booth Newspapers*, the Board of Regents delegated the task of selecting a new president to one person. The Court held that even single individuals can be held subject to the Act if they exercise governmental authority or functions delegated to them by a legislative or governing body by law, rule, or resolution:

> The [University of Michigan Board of Regents], however, argues that Regent Brown's actions do not constitute that of a subcommittee and, therefore, his activities as chair of the Presidential Selection Committee fall outside the OMA's reach. We do not find this argument persuasive. Essentially, the board argues form over substance. The Legislature did not grant any exception to specific types or forms of committees. Therefore, delegating the task of choosing a public university president to a one-man

> committee, such as Regent Brown, would warrant the finding that this one-man task force was in fact a public body. As the *Goode* Court observed, "[w]e do not find the question of whether a multi-member panel or a single person presides to be dispositive. Such a distinction carries with it the potential for undermining the Open Meetings Act . . . .

Booth Newspapers, 444 Mich at 225-26. In sum, the "decision in *Booth* precludes an attempt by a public body to evade the OMA (and thus circumvent legislative intent) by delegating its authority." *Herald Co v City of Bay City*, 463 Mich 111, 135; 614 NW2d 873 (2000).

And yet *Whitney* and the decision below leave no room to hold delegates accountable under similar circumstances. The kinds of duties exempted from enforcement in this case under *Whitney* are vital to the purpose of the Act. The notice provision affords the public an opportunity to attend and supervise the workings of our government; the right to attend a meeting is meaningless unless you know when and where the meeting will take place. The minutes provisions also afford the public an accurate historical record of decisions made, which is vital to exercising an informed vote at future elections. If a "public official" is limited to those persons who are member of the public body, then public bodies can circumvent the OMA by:

- Not posting notices;
- Not making minutes available; and
- Imposing conditions for public attendance and enforcing them through a bailiff or officer

without ever triggering the enforcement provisions. Gutting the enforcement mechanisms for these core right-of-access provisions in the OMA would undermine the Act's purpose no less than in *Booth*.

CONCLUSION

The OMA confers powers and imposes restrictions and duties upon public officials exercising governmental functions by or on behalf of a public body. Accordingly, it makes sense that its enforcement mechanisms are targeted toward all such "public officials," rather than the much more limited group of persons who are "members of public bodies."

It would be shortsighted to adopt the view that inadequate notice, improperly altered minutes, or the wrongful removal of a citizen from a public meeting are *de minimus* violations for which no one should be held accountable. Improperly thwarting a citizen from attending a public meeting, or from learning about the decisions made at a public meeting from accurate minutes, is just as much a violation of the citizen's First Amendment interests as holding a closed session in violation of the OMA. In both circumstances, the public body is selectively controlling information that rightfully belongs to the people:

> Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." They protected the people against secret government.

Detroit Free Press, 303 F3d at 683.

The primary purpose of the First Amendment is to protect and promote free discussion of governmental affairs. Although we make no judgment as to Respondent's motives, adopting her construction of the term "public official" would invite public bodies to return to the days before the OMA's enforcement mechanisms were adopted—the days of backroom politics—and infringe upon the public's fundamental constitutional right of access. The Court should grant Petitioner leave to appeal on this issue and consider adopting a broader definition of "public official" that: (1) conforms to the purpose of the

Act; (2) reaffirms the public's sovereign role in our constitutional order; and (3) protects the public's prerogative to enforce its role by penalizing those who would intentionally subvert it.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: January 15, 2016

ROBIN LUCE HERRMANN (P46880)
JOSEPH E. RICHOTTE (P70902)
JENNIFER A. DUKARSKI (P74257)
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304
(248) 258-1616
luce-herrmann@butzel.com
richotte@butzel.com
dukarski@butzel.com
Counsel for Amicus Curiae
Michigan Press Association